LAI SIEW WAH SDN. BHD.

v.

NG CHIN

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 407 OF 1986]
31 DECEMBER 1987

CIVIL PROCEDURE: *Stay of writ of summons - Section 6 Arbitration Act 1952 - Allegation of fraud raised against appellant - Whether application should be refused - Arbitration clause - Whether appellant precluded from invoking arbitration clause.*

ARBITRATION: *Section 6 Arbitration Act 1952 - Application for stay - Allegation of fraud - Whether application should be refused.*

The appellant was the defendant in High Court Kuala Lumpur Civil Suit No. C 2728 of 1983. The action had arisen out of a written contract made on 7 June 1980, a further document referred to in the statement of claim and an alleged oral contract between the parties. Clause 10 of the written contract provided for arbitration in the event of dispute. The appellant made an application to the High Court under s. 6 of the Arbitration Act 1952 for a stay of the writ action. The learned Judge after having heard further arguments dismissed the said application.

The issue in this appeal which has been raised by the appellant's Counsel was that the learned Judge had erred in law when he decided that the allegation of fraud raised by the respondent precluded the appellant from invoking the arbitration clause.

Held:

Once the High Court was satisfied that there is a *bona fide* allegation of fraud against the appellant, a finding with which the Supreme Court would agree, then the discretion given to the Judge under s. 25(3) of the Arbitration Act was indeed properly exercised.

[Appeal dismissed with costs.]

Cases referred to:

Radford v. Hair & Ors. [1971] 2 All ER 1089
Malaysian Government Officers' Co-operative Society Ltd. v. United Asia Investment Ltd. & Ors. [1972] 1 MLJ 113
Russell v. Russell [1880] 14 Ch 477
Willesford v. Watson [1873] 8 Ch App 473
Wallis v. Hirsh 140 ER 131

Legislation referred to:

Arbitration Act 1952, ss. 6, 25(3)
Rules of the High Court 1980, O. 56 r. 2(2)

For the appellant - V. Pradhan; M/s. Skrine & Co.
For the respondent - Harpal Singh Grewal; M/s. A.J. Ariffin, Chong & Harpal.

JUDGMENT

Wan Suleiman SCJ:

The appellant is the defendant in High Court Kuala Lumpur Civil Suit No C2728 of 1983. The action had arisen out of a written contract between the respondent/plaintiff and the appellant made on 7 June 1980, a further document referred to in para. 4 of the statement of claim and an alleged oral contract between the parties.

Clause 10 of the written contract is an arbitration clause which reads as follows:

> Any dispute or any matters in difference or concerning the construction of this agreement shall be referred to arbitration by a single arbitrator to be appointed by the president for the time being of the Board of Engineers and in accordance with the Arbitration Act, 1952 (Revised - 1972) or any statutory re-enactment for the time being in force.

An application by appellant under s. 6 of the Arbitration Act, 1952 for an order that:

(1) the writ of summons issued in this action on 17 October 1983 and served on the defendant's solicitors on 2 December 1983 be stayed;

and

(2) the plaintiff pays to the defendant its cost of and occasioned by this action, including costs of this application

was allowed after hearing in chambers but subsequent to an application for further arguments in open Court under O. 56 r. 2(2) of the RHC, the learned Judge heard further submission in open Court, and reversed the order earlier made and dismissed appellant's application with costs. This appeal is against that order.

In opposing the application respondent had raised three grounds in his affidavit in reply to the appellant's, the first being that the action was based on a fraud which the alleged appellant had perpetrated on him. The learned Judge took the view that he had given sufficient particulars in support of such allegation, and in view of this finding decided that it would not be necessary for him to go into the other two grounds.

The particulars the learned Judge referred to are to be found in respondent's affidavit and repeated in the statement of claim wherein it was alleged that the appellant had fraudulently forfeited a sum of RM33,218.75 lawfully due to him. The particulars of fraud are that there was an oral agreement between the respondent and one F.K. Lai acting on behalf of the appellant that upon the respondent completing the work contracted for, the respondent would have the right to refuse the purchase of the vehicle and to receive a refund of all monies paid by him to the appellant. He further stated that the appellant knowing that it was not the true owner of the vehicle falsely represented itself to be such, and also falsely represented to the respondent that he would be entitled to a full refund of all monies paid by him. Further, the appellant by itself and together with its solicitor falsely represented to the respondent that upon his executing a certain document the appellant would refund to him all sums paid by him. Respondent added that the appellant by itself or aided by its solicitor knowing the true nature of the transaction took steps to disguise it in the form of an agreement for the purpose of evading the provisions of the Hire-Purchase Act, 1967. He went on to say that the appellant falsely represented to him when he demanded the return of his monies that he was obliged to pay a further sum of RM2,031.25 as he had purchased the vehicle. He further stated that the appellant utilised the agreement and/or the document to perpetuate a fraud

upon him. He added that the appellant by Clause 8 of the agreement, while purportedly giving him an option to purchase the vehicle simultaneously obtained the respondent's signature on an undated document which rendered the respondent a purchaser of the vehicle. Further, he alleged that the appellant, having purportedly sold the vehicle to him, continued to remain the actual owner thereafter and enjoyed the benefit of the vehicle. He also alleged that upon determination of the agreement and by effluxion of time the appellant precluded respondent from exercising his right to refuse purchase of the vehicle.

Respondent had relied on *Radford v. Hair and Ors.* [1971] 2 All ER 1089 and *Malaysian Government Officers' Co-operative Society Ltd. v. United Asia Investment Ltd. & Ors.* [1972] 1 MLJ 113 as authorities for the proposition that once the Court is satisfied that one of the substantial matters at issue is an allegation of fraud on the part of a party, (in the latter case, of the defendant) it could refuse an application by such a party for stay of proceedings.

There was therefore, as Mr. Pradhan admits only one issue in this appeal which, to summarise his memorandum of appeal is that the learned Judge has erred in law in deciding that the allegation of fraud raised by the respondent precludes the appellant from invoking the arbitration clause.

Learned Counsel referred us to *Russell v. Russell* [1880] 14 Ch 477, an authority which he assured us was not cited in the *Malaysian Government Officers' Co-operative Society Ltd.'s* case (*supra*). In *Russell v. Russell,* Jessel M.R. (with whom we would respectfully concur) held that the mere making of a charge of fraud would not entitle a person to call upon the Court to exercise its discretion to refuse a reference to arbitration. He found that there was no *prima facie* evidence of fraud, and therefore declined to exercise his discretion.

We were then referred to *Willesford v. Watson* [1873] 8 Ch App 473. Our attention was drawn to the headnote where it was held, *inter alia,* that neither the want of any appeal, nor the inability of the arbitrators to grant an injunction, formed any objection to a reference.

We are unable to see how that portion of the decision can assist the appellant.

The decision in *Willesford's* case depended solely on the construction of a most comprehensively worded arbitration clause. The Court was thereby impelled to the view that it would be proper to leave it to the arbitrator to decide the matter between the parties.

This is obvious from the following passage of Lord Selborne's judgment at p. 480:

> If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary Courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the Courts to act upon such an agreement.
>
> The parties here have made that agreement. They probably knew what were the reasons in favour of determining these questions by arbitration, and what were the reasons against it, and they made it part of their mutual contract that these questions should be so determined. The plaintiffs cannot, therefore, be now heard to complain if that part of their contract is carried into effect.

Finally, Mr. Pradhan while conceding that *Wallis v. Hirsh* 140 ER 131, an authority considered in the *Malaysian Government Officers' Co-operative Society* case (*supra*) is against him, nevertheless argues that it can be distinguished, because there the affidavit supporting the application showed that the question to be tried was entirely one of fraud whereas in the present appeal the alleged fraud was only one factor.

We cannot agree with learned Counsel. Once the Court below is satisfied that there is a *bona fide* allegation of fraud against the appellant, a finding with which we would agree, then the discretion given to the Judge under s. 25(3) of the Arbitration Act 1952 was indeed properly exercised.

We would accordingly dismiss this appeal with costs here and below. Deposit to respondent to account of taxed costs.

Also found at [1988] 1 CLJ 603